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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ISRAEL L. ROBILLARD, ALTON LEE, JR., MOSES SCOTT, AND ETHELIA CHINN ROBILLARD, SUBSTITUTED PARTY,

Petitioners,

vs.

BATON ROUGE MARINE CONTRACTORS, INC., AND GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL UNION 3033, AFL-CIO,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT BATON ROUGE MARINE CONTRACTORS INC.

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35 pp

QUESTIONS PRESENTED

1. Did the Fifth Circuit Court of Appeals err in affirming the District Court's granting of the respondent's Motion for Summary Judgment dismissing the petitioner's complaint?

2. Did the Fifth Circuit Court of Appeals err in affirming the District Court's denial of the petitioners' Motion to Add Additional Parties Plaintiffs?

3. Did the Fifth Circuit Court of Appeals err in affirming the District Court's denial of Class Action Certification?

STATEMENT REGARDING LIST OF PARTIES TO THE PROCEEDING

The petitioners' list of parties appears to be correct.

STATEMENT OF RELATED PARTIES PURSUANT TO RULE 29.6

Parent Company:

The parent company of Baton Rouge Marine Contractors, Inc. is Gulf Services, Inc.

Subsidiaries:

There are no subsidiaries of Baton Rouge Marine Contractors, Inc.

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STATEMENT OF THE CASE

This matter involves a claim by three black longshoremen, Israel L. Robillard, Moses Scott and Alton Lee, Jr., alleging racial discrimination in hiring. These longshoremen are, or were, members of the General Longshore Worker's Local Union 3033 (hereinafter referred to as "Union"). This respondent, Baton Rouge Marine Contractors, Inc. (hereinafter referred to as "BRMC"), is a member of the Baton Rouge Steamship Association, an association of independent stevedoring companies in the Port of Baton Rouge. The Union and the members of the Baton Rouge Steamship Association have entered into a collective bargaining agreement for the furnishing of labor in the Port of Baton Rouge (*see* petitioners' Appendix E). The hiring of the longshoremen is done on a daily basis. The longshoremen are classified "A", "B", or "C", based upon the number of hours they have worked in previous contract years. All "A" category longshoremen are hired before any "B" category longshoremen, all "B's" before "C's" etc. All of the petitioners were classified as "A", thereby giving them priority in hiring over the other classifications. Within the classifications, the hiring foremen are permitted to rotate the work in an equitable fashion. Mr. Robillard alleges that he was subject to racial discrimination and filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Following the determination by the EEOC that his claim did not have merit, he was issued a right to sue letter. However, he did not timely file his action.

Messrs. Lee and Scott allege that from January 2, 1990, and continuing, Baton Rouge Marine Contractors unlawfully discriminated against them by failing to hire them for certain positions. Their complaints to the EEOC were likewise found without merit. All three petitioners made vague and unsupported claims that BRMC had an established policy, pattern and

practice of hiring each of them for the "grubbiest and most undesirable jobs".

Following the filing of these complaints, BRMC and the Union filed answers. Copies of both the complaint and answers are contained in the petitioners' appendix to the Petition for Certiorari. (Petitioners' Appendix Q, R and S).

Petitioner, Robillard, then filed a Motion for Leave to Amend his complaint to allow a claim of retaliation for the filing of an original claim. The petitioners then moved for leave to amend their complaint to add additional parties plaintiffs. The seventeen additional purported plaintiffs were all longshoremen who apparently also wished to allege racial discrimination. On January 7, 1992, the United States District Court for the Middle District of Louisiana denied the plaintiffs' Motion to Amend Complaint and Add New Parties Plaintiffs. (Petitioners' Appendix U).

The petitioners sought class action certification in their original complaint and also by a Motion dated June 15, 1992. This Motion for Class Certification was denied by the District Court by order dated January 11, 1994. (Petitioners' Appendix H).

BRMC and the Union both filed Motions for Summary Judgment along with supporting affidavits. These motions were filed on August 31, 1993. The Motion for Summary Judgment of BRMC is attached hereto as Appendix A. Oppositions to the Motion for Summary Judgment were filed by the petitioners, and these are attached to the Petition for Writ of Certiorari as Appendix V. The court requested additional reply briefs, and on February 28, 1995, the Honorable Frank J. Polozola, United States District Judge for the Middle District of Louisiana,

granted the Motions for Summary Judgment filed by BRMC and the Union dismissing the petitioners' claim with prejudice. A copy of the District Court's Reasons for the Ruling is contained in Petitioners' Appendix B.

Following this ruling, the petitioners appealed to the United States Court of Appeals, Fifth Circuit. Oral argument was heard on November 8, 1995, and on November 13, 1995, the Court of Appeals issued an Order affirming the judgment of the District Court without comment.

REASONS FOR DENYING THE WRIT

Applicable Principles

Under the rules of the Supreme Court of the United States, a writ of certiorari will be granted only when there are special and important reasons therefor, such as:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Rule 10 of the Supreme Court of the United States.

Petitioners do not clearly assert any of the considerations as being applicable to this case. The only possible consideration here would be in subparagraph (a) regarding a radical departure from the accepted usual course of judicial proceedings. There is no such departure here. This is not a case of national importance or a case involving complicated facts or complex legal analysis. Rather this is simply a situation where the petitioners, as opponents to a Motion for Summary Judgment, have failed to present any admissible evidence to support their opposition.

I.

THE GRANTING OF THE MOTION FOR SUMMARY JUDGMENT DISMISSING THE PETITIONERS' CASE AND THE AFFIRMATION OF THIS ACTION BY THE COURT OF APPEALS WAS PROPER.

A. Discrimination

The petitioners' writ application to the United States Supreme Court raises the same general complaints made to the Fifth Circuit Court of Appeals. Petitioners continue to fail to recognize the requirements of Rule 56 of the Federal Rules of Civil Procedure expressed in such cases as *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The burden is on

the petitioners to establish the central elements of their case. In opposing the Motion for Summary Judgment, the petitioners must present more than mere allegations or denials as to the material facts alleged by the parties supporting the Motion for Summary Judgment. The non-movant must present specific facts "that establish an issue for trial". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986). *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 106 S. Ct. 1348 (1986). The petitioners have failed to present evidence upon which the District Court could have reasonably found that BRMC was guilty of a violation of 42 U.S.C. § 2000 E-2(a)(1-2). This statute makes it unlawful for an employer to fail or to refuse to hire a person or otherwise discriminate against a person because of race, color, religion, sex or national origin. The issue is whether the lower court could have reasonably found for the petitioners based upon the evidence in the record. *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). Respondents filed affidavits presenting facts to support their contention that petitioners could not carry their burden of proof, and the petitioners failed to rebut these facts.

Petitioners contend the defendants' Motions for Summary Judgment should not have been granted and subsequently affirmed arguing that there is a *triable issue of material fact* of racial discrimination derived from the collective bargaining agreement providing for an impermissible seniority scheme where the "court ordered reporting roster at shape-ups was discontinued by the respondents." (Petitioners' Argument, p. 5). However, petitioners utterly failed to identify any alleged triable issues of fact in this case.

The petitioners refer to other cases and present vague and totally unsupported factual allegations and general arguments

that the "A", "B", and "C" categories of the hiring system foster racial discrimination and contend that the respondents should be required to disprove this bold, yet unsubstantiated, assertion. Again, this argument ignores the relevant facts.

Messrs. Robillard, Lee and Scott are all members of the "A" or highest hiring category. They must be hired before any "B" or "C" members. Rather than these gentlemen being personally subject to any discrimination from the classification system, they are among the beneficiaries of the classification system. These gentlemen must be hired before any "B" or "C" members, and there is no allegation whatsoever that this was not done. Petitioners several times refer to the discontinuance of the "court ordered reporting roster". The writ application does not contain a copy of this alleged "court order" nor does it even contain a reference to the case where such an order was promulgated. Respondents are not and have never been aware of the existence of any such order.

Petitioners cite *Carey v. Greyhound Bus Company, Inc.*, 500 F.2d 1372 (5th Cir. 1974) to support their argument that the respondents must prove the hiring plan is non-discriminatory. This case is totally inapplicable to the issues before this Honorable Court. *Carey* involves a situation where a hiring priority was established where the highest priority "A" went exclusively to white employees and the next category "B" went to black employees. This simply is not similar to the case before this Honorable Court. As shown by the attachments to the affidavit of Gregory Johnson (Lodging Appendix D, 12a, *infra*), the "A" category is made up of both black and white longshoremen.

Mr. Robillard's claim for discrimination under 42 U.S.C. § 2000 E-2(a)(1-2) is not before the Court. His claim was dismissed as it was not timely filed as provided by 42 U.S.C.

§ 2000 E-5(f) (1) and this finding was not appealed. (*See* Trial Court's Reasons, Petitioners' Appendix B, pp. 12b-13b). Regarding Mr. Lee and Mr. Scott, the Motion for Summary Judgment was granted on the basis that the report of the petitioners' economic expert, Dr. Kenneth Lehrer, failed to show that there was any discrimination against these gentlemen. In his affidavit, Dr. Lehrer stated that:

> "It is the economic opinion of the undersigned that Messrs. Robillard, Lee and Scott are clearly representative of a class of individuals who have suffered discrimination, although, these three individuals were not subjected to discrimination, *based upon data thus far available* each and every day and each and every opportunity."

(Petitioners' Appendix B, p. 16b).

As the District Court pointed out, there will be no other data forthcoming as the discovery deadline has passed and the District Court was required to base its decision on the information that was available. The District Court went on to explain that Dr. Lehrer had set a bench mark of 1,000 hours of work per year to determine racial discrimination and stated:

> "Using the plaintiffs' expert's own calculation, Local 3033 did not discriminate against Lee in 1991 nor against Scott in 1990 and 1991. On the table identified in Dr. Lehrer's deposition as L-7(a), Lee worked 906 hours in 1990 and 1,028 hours in 1991, while Scott worked 1,118.5 hours in 1990 and 1,449.5 hours in 1991. Since the

> plaintiffs have not presented evidence to defeat defendants' motion for summary judgment, the motion is granted. In conclusion, in order to make the record clear, the Court grants Defendants' Motion for Summary Judgment . . . ."

(Petitioners' Appendix B, p. 18b).

B. Retaliation

On page 12 of the argument for the Petition for Writ of Certiorari, the petitioners contend that where the factual issue of retaliation is presented in an Employment Title VII Action and properly raised under the anti-retaliation provisions of 42 U.S.C. § 2000(e) *et seq.*, a triable genuine issue of fact is presented; and the action is insusceptible to disposition by Summary Judgment. The argument then goes on to cite several cases, most of which do not even deal with Motions for Summary Judgment. As the trial court pointed out,

> ". . . In a Title VII retaliation suit, a plaintiff, in order to establish a prima facie case, must show that (1) he participated in a statutorily protected activity; (2) was the object of adverse employment action; and (3) there was a causal nexus between the activity and the adverse action. At this point a presumption arises which shifts the burden of production to the defendant to come forward with a legitimate, non-discriminatory reason for the adverse employment action through admissible evidence to rebut the presumption created by the prima facie case. The ultimate burden of persuading the trier of fact that the defendant intentionally

> discriminated against the plaintiff remains at all times with the plaintiff."

Citing *St. Mary's Honor Ctr. v. Hicks,* 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993). (Trial Court Reasons, Petitioners' Appendix B, p. 13b).

Judge Frank Polozola, went on to state:

> "Robillard's retaliation claim is defective as a matter of law in that he has not produced any admissible evidence which will show that the explanation given by BRMC is merely a pretext for discrimination. In connection with this motion, BRMC submits the affidavit of Gregory Robert Johnson, the Wharf Superintendent. Johnson states in paragraph 6 of his affidavit:
>
> 'By personal observation, affiant has seen that the ability of Mr. Robillard to perform these tasks [tasks of a clerk] is less efficient, orderly and productive than that of Messrs. Simms, Benton and Hamilton. Mr. Robillard has been extremely slow to specifically respond to requests for information regarding cargo, does not provide sufficient detail concerning the condition of the cargo, has provided incorrect tallies on numerous occasions and does not bring problems to the attention of his supervisors on a timely basis. Mr. Robillard has also placed the wrong cargo on board requiring its removal and rehandling. He has also failed to put cargo on a ship when instructed to do so. In addition,

> customers have complained to affiant regarding errors made by Mr. Robillard in performing duties as a clerk.'
>
> The only evidence adduced by Robillard to rebut this statement made by Johnson is the joint affidavit of Alton Lee, Jr. and Moses Scott. In their affidavit, Lee and Scott state that Robillard, "when hired as a clerk has been singled out to be less capable of performing the job or task of clerk when compared with the white longshoremen who perform the same or similar job or task as clerk, when in fact the white longshoremen performing the job or task of clerk are the bigger mess-uppers." This passage from the Lee and Scott affidavit is void of specific facts which Rule 56(e) requires in order to advert the entering of an unfavorable summary judgment. The Court finds the BRMC is entitled to summary judgment as a matter of law under the facts of this case. Without any rebuttal of the proffered explanation whatsoever, no trier of fact could infer the ultimate fact of intentional discrimination."

(Trial Court Reasons, Petitioners' Appendix B, pp. 14b-15b).

The majority of the cases cited by the petitioners in support of the contention that the factual issue of retaliation under an Employment Title VII action is insusceptible of disposition by Motion for Summary Judgment do not even deal with Motions for Summary Judgment. *Fortino v. Quasar Company Division of Matsushita Electric Corp.*, 751 F. Supp. 1306 (M.D. Ill. 1990)

involved a reduction in force and did not involve any allegations of retaliation. The case had been tried by a jury and obviously involved no Motion for Summary Judgment. *General Telephone Company of the Southwest v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 748 (1982), *on remand,* 686 F.2d 261 (5th Cir. 1982) involved class certification and did not involve an issue of retaliation nor was there any discussion of a Motion for Summary Judgment. Another case cited by the applicants, *Griffin v. Dugger,* 823 F.2d 1476 (11th Cir. 1987), *cert. denied,* 486 U.S. 1005, 108 S. Ct. 1729, 100 L. Ed. 2d 193 (1988), also dealt with class action certification and had nothing to do with claims based on retaliation on summary judgment. The same is true of *General Telephone Company of the Southwest v. Falcon,* 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed. 2d 748 (1982); *Gibson v. Supercargos and Checkers of International Longshoreman's and Warehouseman's Union,* 543 F.2d 1259 (9th Cir. 1976) and *Mays v. Williamson and Sons, Janitorial Services, Inc.,* 775 F.2d 258 (8th Cir. 1985). Contrary to the petitioners' argument, summary judgment is an appropriate and often used means of resolving allegations involving the anti-retaliation provisions of the Civil Rights Act. The case *EEOC v. J.M. Hubert Corp.,* 927 F.2d 1322 (5th Cir. 1991), cited by petitioners, does not stand for the proposition that anti-retaliation cases are insusceptible to Motions for Summary Judgment. Rather the case stands for the fact that if the party alleging anti-discrimination establishes a prima facie case under the McDonnel/Burdine standard, the burden shifts to the employer to produce a legitimate non-discriminary reason for its policy. In the case at bar, the District Court held that following the affidavit from Gregory Robert Johnson quoted above, the only evidence adduced by Robillard to rebut the statement was a joint affidavit of Alton Lee and Moses Scott which stated that when Mr. Robillard was compared to the white longshoremen who performed the same or similar tasks as clerks, the white longshoremen were "bigger mess-

uppers." (Trial Court Opinion, Petitioners' Appendix B, p. 15b). The trial court held that Robillard's claim for retaliation was defective as a matter of law and that he had not produced any admissible evidence which would show that the explanation given by BRMC, through the affidavit of Mr. Johnson, was a pretext for discrimination.

It is obvious from the District Court's opinion that the petitioners failed to present credible evidence to support the vague and unspecific complaints contained in their petition. This was amply pointed out to the petitioners by the court during oral argument in the Court of Appeals. The granting of the Motion for Summary Judgment by the District Court and the affirmation of this ruling by the Court of Appeals is correct, and this application for writs of certiorari should be denied.

II.

WAS THE DENIAL OF THE MOTION TO ADD ADDITIONAL PARTIES PLAINTIFFS PROPER?

The petitioners attempted to add approximately seventeen additional parties as parties plaintiffs. The Federal Rules of Civil Procedure 20(a) allows permissive joinder where the plaintiffs assert a right to relief arising out of the same transaction or occurrence or a series of transactions or occurrences if there are questions of law or fact common to all parties. The District Court correctly concluded that each individual employee's potential claim would present different issues of law and fact (Appendix B, *infra*). The number of times that each potential employee makes himself available at the hiring center, his classification ("A", "B" or "C"), his willingness to work additional hours, and his job skills would present issues individual to each person. In addition, none of the persons who were attempted to be added as plaintiffs had filed employment discrimination charges with the

EEOC. There is no evidence that these persons exhausted their appropriate administrative remedies as required by 42 U.S.C. § 2000(e)(5).

It is therefore respectfully submitted that the District Court's action in this respect was correct.

III.

THE DISTRICT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION FOR CLASS CERTIFICATION.

The petitioners contend that their request for class certification was inappropriate due to the fact that this is a Title VII action. The determination of class certification lies within the discretion of the trial court, and the trial court's determination will stand absent an abuse of discretion. *Walker v. Jim Dandy Company*, 638 F.2d 1330, 1334 (5th Cir. 1981). Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. Rule 23(a) provides four prerequisites to the certification of class actions:

> (1) The class must be so numerous that joinder of all members is impractical;
>
> (2) There are common issues of law and fact;
>
> (3) The claims of representatives are typical of the class; and
>
> (4) The representatives will fairly and adequately represent the interests of the class.

In denying the petitioners' motion for class certification, the lower court found that the proposed class (31 persons) was not so numerous that joinder was impractical nor were the legal issues of the case common to all members of the proposed class. (Appendix C, *infra*) Petitioners failed and continue to fail to present any evidence demonstrating that these conclusions of the lower court were in error.

At its maximum, the proposed class numbers 31 individuals, all of whom were residents of the Baton Rouge area. In fact, in their attempt to add additional plaintiffs, the petitioners listed the addresses of seventeen of the members of the purported class. Where the petitioners' counsel already has filed in the record the addresses of over half of the proposed class, it is difficult to imagine that the size of the class would be a problem. In addition, the requirement of common questions of law and fact do not exist with all members of the purported class due to the fact that there are several individual factors which would be pertinent. These would include:

(a) Did the person make himself available on a particular day;

(b) What specific jobs were available that day and was the petitioner capable of performing these jobs;

(c) What was his classification; and

(d) The necessity to provide an equitable rotation of work among those present.

The District Court's denial of the application for class certification and the Court of Appeal's affirmance thereof was proper.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — BATON ROUGE MARINE CONTRACTORS' MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NUMBER: 91-633

SECTION "B"

MAGISTRATE "2"

ISRAEL L. ROBILLARD, ALTON LEE, JR., and MOSES SCOTT

Plaintiffs

VERSUS

BATON ROUGE MARINE CONTRACTORS, INC., and GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL UNION 3033, AFL-CIO

Defendants

MOTION FOR SUMMARY JUDGMENT

COMES NOW, BATON ROUGE MARINE CONTRACTORS, INC., defendant herein, by and through undersigned counsel, and respectfully moves the Court,

pursuant to Rule 56(b) and Rule 56(c) of the Federal Rules of Civil Procedure, Title 28, United States Code, for summary judgment in favor of the defendant dismissing this action on the basis that there are no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law.

Alternatively, in the event this Honorable Court should determine there are genuine issues as to some material facts, defendant moves for partial summary judgment dismissing those claims as to which there is no genuine issue of material fact.

In support of this motion, and pursuant to Uniform Local Rule 2.09, a statement of uncontested facts is attached hereto as Attachment 1.

WHEREFORE, for the reasons more fully set forth in the Memorandum in Support of Summary Judgment, Baton Rouge Marine Contractors, Inc. pray that this motion be granted and Plaintiffs' action dismissed.

BY ATTORNEYS

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Appendix A

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NUMBER: 91-633

SECTION "B"

MAGISTRATE "2"

ISRAEL L. ROBILLARD, ALTON LEE, JR;, and MOSES SCOTT

Plaintiffs

VERSUS

BATON ROUGE MARINE CONTRACTORS, INC., and GENERAL LONGSHORE WORKERS, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL UNION 3033, AFL-CIO

Defendants

STATEMENT OF UNCONTESTED FACTS

COMES NOW the defendant, BATON ROUGE MARINE CONTRACTORS, INC., in the above captioned action, and pursuant to the requirements of Uniform Local Rule 2.09, files the following statement of material fact as to which it is contended there is no genuine issue:

Appendix A

1) The plaintiffs, for a period of time preceding the alleged discrimination, were members of Local 3033 and were employed by BRMC.

2) Members of Local 3033 provide longshore labor to BRMC and other employers in the Port of Greater Baton Rouge.

3) The employees are hired each day for the jobs that are available that day depending upon the ships which might be in port and other work that may be available on that particular day.

4) In accordance with the Collective Bargaining Agreement between Local 3033 and the member companies of the Baton Rouge Steamship Association, including BRMC, there is a classification system in which the employees are designated as either A, B, C or unclassified employees. "A" classification members are hired before any others.

5) Plaintiff, Robillard, filed a charge with the Equal Employment Opportunity Commission ("EEOC") dated February 7, 1990 (EEOC charge #270-90-0510). A notice of right to sue was issued on June 27, 1990. The complaint in this matter was filed on July 8, 1991.

6) On March 1, 1991, Baton Rouge Marine Contractors hired five black longshoremen and five white longshoremen to work in the warehouse (see affidavit of Greg Johnson -Exhibit B to Motion for Summary Judgment).

Appendix A

7) Attachment "J-1" to the affidavit of Greg Johnson states the names, race, classification and hours worked in the Port by longshoremen during the years indicated.

8) Messrs. Albert Simms, George Benton and Mike Hamilton were employed as clerks by Baton Rouge Marine Contractors and based upon the personal observations of Greg Johnson, Wharf Superintendent for Baton Rouge Marine Contractors, performed the tasks required of a clerk in a more productive and efficient manner than I. L. Robillard. (see Exhibit B – affidavit of Gregory Johnson)

9) I. L. Robillard, when selected as a clerk by Baton Rouge Marine Contractors, has failed to provide sufficient details regarding the cargo's condition and location; has been extremely slow to specifically respond to requests for information regarding cargo; has provided incorrect tallies; does not timely report problems to supervisors; has loaded the wrong cargo on ships; and has failed to load cargo on ships. (see Exhibit B - affidavit of Gregory Johnson)

10) In accordance, with the Deep Sea Agreement (Exhibit D), all "A" classified men, who appear at daily shape-up, have been offered employment before any "B", "C" or unclassified men.

In 1990 the following persons were not classified as "A" and worked in excess of 500 hours:

Appendix A

NAME	RACE	CLASSIFICATION	HOURS
Byron Harden	B	None	643
Johnny Robertson	B	None	658.5
Jimmy Rowe	B	None	506
Elvin Whitehead	W	C	555

In 1991, the following persons were not classified "A" and worked in excess of 500 hours:

NAME	RACE	CLASSIFICATION	HOURS
Lawrence Williams	B	C	951
Johnny Robertson	B	C	815.5
Jimmy Rowe	B	C	751.0
Bertel A. Borris	B	None	642.5
Huey Johnson	B	None	630.5
Larry J. Bourgeois	W	B	888.5
Elvin Whitehead	W	C	844
Calhoun Hamilton	W	None	896
James Suggs	W	None	670

Appendix A

BY ATTORNEYS

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APPENDIX B — RULING/JUDGMENT BY UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT TO ADD PARTIES PLAINTIFF

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NUMBER 91-633-B

ISRAEL L. ROBILLARD, ET AL

VERSUS

BATON ROUGE MARINE CONTRACTORS, INC., ET AL

RULING ON PLAINTIFFS' MOTION TO AMEND COMPLAINT AND ADD NEW PARTIES PLAINTIFF

The plaintiffs have filed a Motion for Leave to Amend Complaint and Amended Complaint by Adding Parties Plaintiff. The Court believes the motion should be denied without prejudice to the right of each of the parties in the proposed amendment to file a separate suit. Each plaintiff's case is a different case with different issues of law and fact. The damages are not the same. Each plaintiff may file a separate lawsuit and if the facts and law show the cases are similar, the cases may be consolidated for discovery, trial, or both.

Baton Rouge. Louisiana, January 7, 1992.

s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

APPENDIX C — RULING/JUDGMENT BY UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF LOUISIANA, DENYING PLAINTIFFS' REQUEST FOR CLASS ACTION CERTIFICATION

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION

NUMBER 91-633-B-2

ISRAEL L. ROBILLARD, ET AL.

VERSUS

BATON ROUGE MARINE CONTRACTORS, INC., ET AL.

RULING ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This matter is before the Court on the plaintiffs' motion for class certification. A review of the record reveals that plaintiffs have failed to meet the standards required for a class action under Rule 23 of the Federal Rules of Civil Procedure. Therefore, the motion for class certification is denied.

Rule 23 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to

> the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

The Court finds that the class is not so numerous that joinder of all members is impracticable. The practicability of joinder depends on the size of the class, ease of identifying its members, determining their addresses, facility of making service on them if joined and their geographic dispersion.[1] In this case the size of the class is approximately 30 individuals, all of whom have been identified and addresses provided. They also are in a relatively confined and accessible geographical area. Other potential members cannot join because they have not exhausted appropriate administrative remedies.

Furthermore, the legal and factual issues involved in this case are not the same for each plaintiff. Specifically, the questions of fact are not sufficiently common to the potential class for Rule 23 certification. Each plaintiff's claim is separate and distinct based upon the member's capabilities and whether the member appeared for work on a given day. In *In Re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), the Fifth Circuit rejected a class action because of the numerous differences in the plaintiffs' claims, causation problems and damage issues. The same or similar problems are present in this case. Therefore, the Court finds as a matter of fact and law that a class action is not proper under the facts and circumstances of this case.

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1. Garcia v. Gloor, 618 F.2d 264, 267 (5th Cir. 1980).

Appendix C

Therefore:

IT IS ORDERED that plaintiffs' motion for class certification be and it is hereby DENIED.

Baton Rouge, Louisiana, September 4 , 1992.

s/ Frank J. Polozola
UNITED STATES DISTRICT JUDGE

APPENDIX D — AFFIDAVIT OF GREGORY JOHNSON DATED AUGUST 30, 1993, WITH EXHIBITS

(Omitted here but submitted separately as Lodging Appendix.)